IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 651 of 1998

Natrajan Chandran .. Petitioner

versus

Apna Sahakari Bank Ltd. & Ors. .. Respondents

...

Mr.R.V. Govilkar a/w A.I. Patel i/b I.A. Patel for the petitioner.

Mr.Prasad Gaonkar for the respondent no.1.

Mr.Shiraz Rustamjee a/w Kedar Dighe for respondent no.4.

Ms.Mamta Sadh, AGP for respondent nos.8 and 9.

CORAM : D.G. KARNIK, J

DATED : 6th June 2006.

ORAL JUDGEMENT :-

1. The petitioner is a member of the Royal

Industrial Co-operative Society Limited (for short 'the Society') and has been allotted Gala number C-16 in the said Society. The society has also issued a share certificate in the name of the petitioner by virtue of which the petitioner is entitled to possess the said gala. In common parlance, the petitioner is the owner of Gala number C-16.

2. It appears that the petitioner intended to sell the said Gala number C-16 and the respondent no.2 firm of which the respondent nos.3 and 4 at the relevant time were the partners desired to purchase the same. A memorandum of understanding was executed between the petitioner and respondent no.2 in August 1989. The memorandum states that the petitioner would sell the Gala number C-16 to respondent no.2 for a consideration of Rs.9 lakhs which was to be paid in three instalments. Clause (9) of the memorandum specifically states that the parties were to execute a formal agreement of sale within a period of one month. It appears that no formal agreement of sale was ever entered into between the petitioner and respondent no.2 and the transaction of sale was never completed.

3. The respondent no.2 approached the respondent

no.1 Bank for a loan to raise money for purchase of the gala. It appears that part of the loan was advanced and part of the amount of the consideration was also paid to the petitioner. There is some controversy between the parties as to whether the possession of Gala number C-16 was delivered by the petitioner to the respondent no.2. It is however undisputed that on 20th June 1997, the petitioner was in possession of the Gala and was dispossessed by the respondent no.1 bank with the help of Special Recovery Officer in execution of an award obtained by it against the respondent no.2 and its partners for recovery of the amount of the loan and interest. It appears that after the execution of a memorandum in August 1989, the respondent no.2 firm came in possession of the share certificate issued by the society in the name of the petitioner. According to the respondent no.2 the petitioner handed over it while asccording to the petitioner the respondent no.2 took it from the middleman for inspection but never returned it. It appears that the respondent no.2 who was in possession of the share certificate issued by the society offered to create a security over the said Gala no. C-16 in favour of the respondent no.1 by depositng the share certificate with the bank as the

document of title. As the respondent no.2 did not repay the loan borrowed by it, the respondent no.1 filed a dispute before the Co-operative Court and obtained an award against the respondent no.2 under the provisions of the Maharashtra Co-operative Societies Act 1960 on 9th October 1996 for recovery of Rs.14,25,159/-. Respondent no.1 Bank put the said award in execution and on 20th June 1997, the Special Recovery Officer dispossessed the petitioner and took possession of the gala from him.

4. According to the petitioner neither the respondent no.1 nor the Special Recovery Officer had any authority to dispossess him who was lawfully in possession of the gala no.C-16 as an owner - an allottee of the Society. According to the petitioner, he was dispossessed high handedly and without following due procedure of law. The petitioner was not a party to the dispute which was filed by respondent no.1 against the respondent no.2 and its partners for recovery of the money. No award (decree) was passed against the petitioner. The respondent no.2 had no authority to mortgage the Gala C-16 as petitioner was the owner and he had not sold the same to the respondent. He had not even entered into the

formal agreement of sale and only a memorandum of understanding was entered into which was breached by the respondent no.2 and therefore, title never passed to the respondent no.2. Respondent no.2 therefore had no authority to create a mortgage of the gala and the mortgage purportedly created by respondent no.2 was not binding on the petitioner. According to the petitioner, the respondent no.1 bank or the Special Recovery Officer could not have executed the award against the Gala C-16 which belonged to the petitioner and not to the respondent no.2.

5. As the Gala no. C-16 was attached by the respondent no.1 through the Special Recovery Officer, illegally and without following due procedure of law, the petitioner filed a Writ Petition bearing W.P.No.1498 of 1997 in this court challenging the action of the respondent no.1. When the Writ Petition came up for hearing, this Court was of the view that the petitioner had an alternative efficacious remedy available under Rule 107 of the Maharashtra Co-operative Societies Rules, 1961. This Court therefore declined to entertain the Writ Petition but directed that if the petitioner made an application u/s.107 to the concerned authorities who would pass

orders thereon in accordance with law. The petitioner accordingly made an application to the Divisional Joint Registrar for vacating the attachment. The application was treated as a Revision. The Divisional Joint Registrar, the respondent no.8 herein, by his judgement and order dated 18th December 1997 dismissed the petitioner's application. That order is impugned in this petition.

6. It is not disputed that the petitioner was the original owner of Gala no. C-16. The petitioner and the respondent no.2 entered into a memorandum of understanding regarding sale and purchase of the said gala in August 1989. In pursuance of the said memorandum, the respondent no.2 came in possession of the share certificate though the manner in which the share certificate came in possession of the respondent no.2 is disputed. The petitioner borrowed money from the respondent no.1 Bank to enable it to pay consideration for purchase of the said gala and offered the same as a security to the respondent no.1 though he had not acquired the ownership thereto. The respondent no.2 did attempt to create an equitable mortgage of the said gala by deposit of the share certificate which was in its possession. However as

on that date the respondent no.2 was not the owner, it could not have created the equitable mortgage of the said gala in favour of the respondent no.1. At the most, respondent no.2 had a right to get its title perfected by execution of an appropriate deed of transfer. He was required to execute a formal agreement within a period of one month and thereafter get his title perfected by obtaining an appropriate deed of transfer. This was never done. Even the share certificate was not transferred in the name of respondent no.2. Respondent no.2 was only in possession of the share certificate which was standing in the name of the petitioner. The respondent no.2 therefore had no right to create an equitable mortgage. Either the possession of the gala was not delivered to the respondent no.2 or if it was ever delivered he redelivered it to the petitioner and the petitioner continued to be in possession of the said Gala no.C-16. The title of the respondent no.2 was never perfected even so as to attract the provisions of section 43 of the Transfer of Property Act. The mortgage created by respondent no.2 in favour of the respondent no.1 therefore would not and cannot affect the rights of the petitioner in the said gala.

7. Learned counsel for the respondent no.1 submitted that the petitioner having entered into an agreement to sell the said gala no.C-16 and having parted possession thereof to the respondent no.2, it was entitled to create an equitable mortgage as it had a possessory title. In support, the learned counsel referred to and relied upon a decision of Calcutta High Court in Amulya Gopal Majumdar Vs. United Industrial Bank reported in AIR 1981 Cal 404. In that case, the Calcutta High Court has held that the person who was in possession of the property was entitled to create an equitable mortgage of his possessory title as a security. In the present case, there is no proof that the possession of Gala no.C-16 was ever handed over to the respondent no.2. The respondent no.2 was not in possession and on 20th June 1997 the possession of the said gala was taken by the respondent no.1 and its Special Recovery Officer from the petitioner and not from the respondent no.2. Therefore, the respondent no.2 had no legal title and not even a possessory title. It could not therefore create any mortage of the possessory title. In my view therefore, the decision of the Calcutta High Court is of no assistance to the respondent no.1.

8. From the facts, it is clear that the petitioner was the original owner of the property, the title of the property was never transferred by the petitioner to the respondent no.2. At best, there was an agreement to sell giving right to the respondent no.2 to sue for specific performance. It had no right to create a charge or mortgage to the said gala. The petitioner had never borrowed any money from the respondent no.1 Bank and had not created any charge or mortgage over his property in favour of the respondent no.1. Respondent no.1 was therefore not entitled to execute the award obtained by it against respondent no.2 against the petitioner or his property including Gala C-16. In the circumstances, the attachment of the property of the petitioner effected by respondent no.1 with the help of Special Recovery Officer is clearly illegal and without authority of law. Hence, Writ Petition deserves to be allowed.

9. Rule is accordingly made absolute in terms of prayer clauses (a), (b) and (c). The respondent no.1 shall pay the costs of this petition to the petitioner. The Court Receiver who is in possession of the property stands discharged. He shall hand over the possession of the gala to the petitioner after 30

days hereof.

D.G. KARNIK, J